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In the

Supreme Court of the United States

OCTOBER TERM — 1963

No. 481

VENUS THEATRE CORP.,
Petitioner

vs.

PARAMOUNT FILM DISTRIBUTING CORP., *et als.*,
Respondents

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

AND

BRIEF FOR THEATRE OWNERS OF AMERICA, INC., AND ALLIED STATES ASSOCIATION OF MOTION PICTURE EXHIBITORS, AS AMICI CURIAE

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ASSOCIATIONS:

Allied States Association of Motion Picture Exhibitors, Detroit, Mich. 1

Motion Picture Association of America, Inc., New York City, New York 9

Theatre Owners of America, Inc., New York City, New York 2

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MOTON OF THEATRE OWNERS OF AMERICA, INC., AND ALLIED STATES ASSOCIATION OF MOTION PICTURE EXHIBITORS FOR LEAVE TO FILE A BRIEF, AS AMICI CURIAE

The above-named organizations hereby respectfully move for leave to file a brief annexed hereto, as *amici curiae*, in this case. The Petitioner, the distributor — Respondents, and Fox — Philadelphia Building, Inc. refused their consent. William Goldman Theatres, Inc., Stanley-Warner Management Corp., and Stanley Co. of America granted their consent.

Allied States Association of Motion Picture Exhibitors is a national association of theatre owners and operators, comprising approximately 5,000 theatres.[1] Its Constituent Regional Asso-

[1] Allied States Association of Motion Picture Exhibitors, Detroit, Mich.

ciations are: Allied Theatre Owners of the Gulf States, Inc.; Allied Theatres of Illinois, Inc.; Allied Independent Theatre Owners of Iowa, Nebraska, South Dakota, Inc.; Allied Theatre Owners of Kentucky, Inc.; Allied Motion Picture Theatre Owners of Maryland, Inc.; Allied Theatres of Michigan, Inc.; Allied Theatre Owners of New Jersey, Inc.; Allied Theatres of New York States, Inc.; North Central Allied Independent Theatre Owners, Inc.; The Independent Theatre Owners of Ohio; Allied Theatre Owners of Texas; West Virginia Allied Theatres Association, Inc.; Allied Motion Picture Theatre Owners of Western Pennsylvania; and, Allied Theatre Owners of Wisconsin.

Theatre Owners of America, Inc., is a national association of theatre owners and operators, comprising approximately 7,500 theatres.[2] Its Constituent Affiliates, are: Alabama Theatres Association; Independent Theatre Owners of Arkansas; Arizona Theatre Association; Motion Picture Theatre Owners of Arkansas, Mississippi and Tennessee; Northern California Theatre Association; Theatre Owners of North and South Carolina; Motion Picture Theatre Owners of Connecticut; Motion Picture Theatre Owners of Metropolitan D.C.; Motion Picture Exhibitors of Florida; Motion Picture Theatre Owners and Operators of Georgia; United Theatre Owners of Illinois; Allied Theatre Owners of Indiana; United Theatre Owners of the Heart of America; Louisiana Theatre Owners Association; Maryland Theatre Owners Association; Mississippi Theatre Owners Association; Missouri-Illinois Theatre Owners; Montana Theatre Association; Mountain States Theatres Owners Association; Theatre Owners of New England; New Jersey Chapter of TOA; New Mexico Theatre Association; Theatre Owners of Ohio Valley; Oregon Theatre Owners Association; Theatre Owners of Pennsylvania; Tennessee Theatre Owners

[2] Theatre Owners of America, Inc., New York City, New York.

Association; Texas Drive-In Theatre Owners Association; Virginia Motion Picture Theatre Association; Theatre Owners of Washington, Northern Idaho and Alaska.

The total membership of these two national exhibitor associations represents almost ⅔ of the 19,000 theatres in the United States.[3] Operators of only one theatre constitute a substantial and significant segment in each association.

One of the issues raised by the Petitioner in this Court, is whether the split of product, claimed by the Petitioner to have existed among the theatre-defendants, was illegal. In order to avoid straight auction competitive bidding, which is the alternative to splitting product, a very substantial number of the theatres in this country are operating on a split-of-product basis; and, a very substantial number of theatres are negotiating among themselves, almost constantly, in attempts to evolve splits of product. A holding by this Court, that the split in the instant case, and that other types of splits are illegal *per se*, or are in restraint of commerce to a point beyond the "rule of reason", will seriously and adversely affect all theatres now operating on a split basis, and all who are negotiating for them at this time, and all other theatre owners. It will be of assistance to this Court to hear from these thousands of theatres regarding their views on why splits are legal.

The split in the instant case is limited in its territory, and in its effect, to the first run of pictures in Philadelphia. The Record before this Court, and the thrust of the arguments by the Petitioner, and by the Respondents, will concern that particular split. In view of that, it will be of assistance to this Court to know of the impact of its decision, on this point, nationally, on the entire motion picture industry.

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[3] *The Film Daily Year Book of Motion Pictures*, (45th ed., 1963), at 111. This reference, at 109, estimates the United States film theatre investment at 2 billions, 670 millions of dollars.

Further, it is respectfully submitted, that this Court should be informed that this case is neither the appropriate occasion, nor an adequate context in which to assess the function and legality of the split.

WHEREFORE, the Applicants respectfully pray that they be accorded permission to file a brief *amici curiae*, in order to present arguments and viewpoints on the matters involved in this case, which the parties themselves will probably not present.

Respectfully submitted,

HERMAN M. LEVY,
152 Temple Street,
New Haven, Connecticut 06510
Attorney for Amici Curiae

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INTEREST OF AMICI CURIAE

It is crucial to the survival of the motion picture industry, that this Court hold that this is not the type of case wherein it should pass on the validity of the widely used industry practice, known as the split. It is a practice of cardinal importance to the industry. If this Court decide that this is the type of case wherein it should make that decision, then, it is respectfully submitted, that it should hold valid the split in the instant case, and all other types of splits that are within the

"rule of reason". The decision of this Court should not involve the judiciary in the intricate and detailed facets of an industry. That is exactly what this Court sought to avoid in *Paramount Pictures, Inc.* vs. *United States*, 334 U.S. 131, 162 (1948).

The importance of this Court's decision in this regard, is emphatically testified to by the fact, that for the first time within the memories of the members of the *amici curiae*, representing about ⅔ of the 19,000 theatres in this nation, have they appeared, united and of one purpose, and with one representative to speak for them. All of the years of disunity between these two associations, and all of the years of non-cooperation for common objectives, well known to Governmental agencies, have been put aside, in order that this Court may know that those for whom the decision in this case has the most significant meaning, are as one in an attempt to assist this Court. Even more uniquely, the *amici curiae* appear here in support of their sources of supply — *the distributors* — on the subject of the split.

ARGUMENT

Amici curiae, the owners of approximately 12,500 of the 19,000 motion picture theatres in the United States, submit this brief to express their intense concern, and their position concerning Petitioner's challenge to a vital industry practice — the split. *Amici curiae* wish to show the Court that the split is crucial to the well-being and competitive vigor of the American motion picture industry, and that it should not be declared unlawful in this case for the following reasons:

I. The present case provides neither the appropriate occasion, nor an adequate context in which to assess the function and legality of a long-standing industry-wide mode of distribution such as the split;

II. The factual determinations made by the District Court, and by a unanimous Court of Appeals make the split's legality irrelevant here; and,

III. The split is, in any event, a lawful method of distribution, and is neither illegal *per se*, as Petitioner contends, nor is it illegal because of its purpose nor effect on competition.

The Split Is A Basic Method Of Distributing Motion Pictures And Is Essential To The Industry.

Petitioner's attempt to challenge the split has implications far beyond the narrow confines of this private treble damage action, because splitting is a basic, nationwide distribution pattern of the motion picture industry. Should Petitioner's attack succeed here, it is entirely probable that the American motion picture industry could not continue on even its present reduced scale.

What a Split is

The split is a method of motion picture distribution under which a distributor agrees with exhibitors in a competitive area, that each exhibitor will attempt to negotiate or to bid for only certain of the particular distributor's pictures. There may be isolated instances in the distribution of motion pictures, as in other industries, in which exhibitors secretly agree on a division of a distributor's product, but that is not the present case, nor is any such practice defended here. The split upon which motion picture distribution is based, and which *amici curiae* believe to be absolutely essential, is a *vertical* arrangement involving the agreement and participation of the distributor and, as will be shown, providing the distributor substantial legitimate business advantages. Exhibitors who do not wish to participate in a split

may and do bid or negotiate for films, and obtain them. That being so, there is no factual basis of complaint in an exhibitor who, for economic reasons of his own, decides not to be a party to a split. Why, therefore, should he be permitted to disturb a valid, well-functioning trade practice which is of benefit to all of the parties, including him?

Origin and Importance of the Split

The split developed as the only feasible alternative to distributing each film by auction to the highest bidder, a practice known as competitive bidding. While it is clearly lawful, competitive bidding is so unsuited to motion picture distribution that this Court refused to compel it when the matter was before it in *Paramount Pictures, Inc.* vs. *United States, supra.*

Should the Court now disapprove the split, it would effectively compel what it refused to order in *Paramount:* a system of competitive bidding. A review of the reasons given by this Court in *Paramount*, speaking through Mr. Justice Douglas, for rejecting compulsory competitive bidding, is, therefore, vital. This Court's reasons were two: (1) competitive bidding would require "the use of standards incapable of precise definition because the bids being compared contain different ingredients", and so enforcement of the system by the courts "would be apt to require as close a supervision as a continuous receivership"; and (2) the largest and financially most powerful exhibitors were likely, since they possessed the "longest purse", to get the best films, and thus to eliminate many of their smaller, less affluent rivals. (334 U.S. 131, 163-164).[4]

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[4] Reich, *The Entertainment Industry and the Federal Antitrust Laws*, 20 So. Cal. L. Rev. 1, 25 (1946); *Judicial Regulations of the Motion-Picture Industry: The Paramount Case*, 95 U. Pa. L. Rev. 662, 668 (1947); McDonough & Winslow, *The Motion Picture Industry: United States* v. *Oligopoly*, 1 Stan. L. Rev. 385, 411-412 (1949).

For want of an immediate alternative, however, competitive bidding became the industry pattern, after the divorcement Decrees. Thereafter, simultaneously with the catastrophic impact of television, there occurred a phenomenal increase in the cost of motion picture production.[5] At a time, therefore, when the motion picture industry was fighting for its life against new modes of entertainment, competitive bidding was destroying the weaker exhibitors.

The development of the split, as an alternative to the straight auction system of competitive bidding, helped save the situation. The primary benefit of splitting to exhibitors is survival.[6] Films reach exhibitors who could not afford them under competitive bidding. The benefits for distributors must also be stressed. They are, primarily, a lessening of the risks and expense of litigation; and, the preservation of outlets essential for market coverage. These benefits, consist of nothing more nor less than an alleviation of the characteristics of competitive bidding which *Paramount* foresaw as undesirable.

Litigation is lessened when exhibitors agree to a split because the distributor is not regularly involved in comparisons

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[5] One result has been the decrease in the number of pictures distributed in this country by American national distributors. In 1951, the first full calendar year subsequent to the entry of the final *Paramount* decrees, 427 pictures were distributed. The number dropped almost steadily until 1963, when only 194 pictures were distributed. *Motion Picture Association of America, Inc.*, a trade group comprising in its membership, most of the American national distributors of motion pictures, New York City, New York.

[6] Federal courts have recognized that splitting helps exhibitors to survive. See *Brown* vs. *Western Massachusetts Theatres, Inc.*, 288 F.2d 302, 305 (1st Cir. 1961), and *Royster Drive-In Theatres, Inc.* vs. *American Broadcasting-Paramount Theatres, Inc.*, 268 F.2d 246, 250 (2d Cir. 1959).

of bids containing different combinations of ingredients. The reduction of litigation, which has wracked the industry for the better part of the last fifteen years, is a heavy factor in favor of splitting.

The split also mitigates the power of the "longest purse", and thereby helps the distributor keep the exhibitors, who are his outlets, in business. As competition within the industry, and with other forms of entertainment intensifies, it is increasingly important to the long-run success of a distributor that it use a system which does not respond solely to the short-run gain of obtaining the highest bid on each film, but which also spreads films sufficiently to ensure continuing market coverage.

I.

This Is Not An Appropriate Case In Which To Decide The Legality Of An Important Industry-Wide Practice.

This case, *amici curiae* respectfully suggest, provides neither the appropriate occasion, nor an adequate context in which to assess the function and legality of an industry-wide mode of distribution. The last section of this brief will demonstrate, we submit, that the split is clearly a lawful practice. But, even assuming *arguendo*, that there were some doubt, we think it perfectly clear that Petitioner has not made a record, including all of its proferred evidence, which would enable this Court to act upon the question.

White Motor Co. vs. *United States*, 372 U.S. 253 (1963), illustrates the use of sound discretion in refusing to condemn business practices without a record adequate to convey a substantial understanding of an entire industry affected. The instant Record, albeit replete with facts concerning 4 exhibitors in Philadelphia, cannot possibly be used as an adequate basis

for ". . . an ascertainment of the facts peculiar to the particular business. . . ." (372 U.S., at 261). Nor is it adequate to convey ". . . enough of the economic and business stuff . . .", (372 U.S., at 263), on which to base a decision outlawing a practice so crucial to a complex and nationwide industry.

A record adequate to move this Court to decide this case, in the manner suggested by Petitioner, would be that kind which would be available to this Court in antitrust litigation initiated by the Department of Justice.

II.

This Case Turns Upon Factual Analyses Already Made By Two Federal Courts, And Not Upon The Abstract Legality Of The Split.

Petitioner's challenge to the split is wholly irrelevant to the case before this Court. Petitioner is really asking this Court to repeat the intensive analysis of the facts that two Federal Courts have already undertaken, and to reverse their unanimous conclusion that Petitioner's evidence is inadequate. That is not, we respectfully suggest, the function of the Supreme Court of the United States.

That Petitioner is actually seeking a review of its evidence is easily demonstrated. Petitioner claims that the split lowers film rentals. If so, it benefits Petitioner. But, Petitioner attempts to escape this logic by offering a mass of data which it claims will, when extensively dissected and analyzed, show that it has been discriminated against, and that this must have been due to the split. Four Federal Judges have already carefully examined Petitioner's evidence, and each of them has concluded that it was inadequate to show either that the split was unreasonable, or that Petitioner suffered any injury from it. In *Comstock* vs. *Group of Institutional Investors*, 335 U.S.

211, 213-214 (1948), this Court stated: "Much of petitioner's argument seems . . . to invite us to reach conclusions from the voluminous record in the case, contrary to those reached by the two courts below. This we cannot do. A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error. . . ."

If this Court were to review the facts of cases such as this, courts of appeal would be superfluous in treble damage actions, and the Expediting Acts might as well be extended to cover all antitrust cases.

III.

The Split Is A Lawful Method Of Distribution.

The split does not have a "'pernicious effect on competition'", nor does it "'lack . . . any redeeming virtue. . . .'"[7] It is lawful. It is not to be outlawed by a simplistic analogy to agreements by competitors dividing territories. There is strong authority which, we submit, affirmatively demonstrates that the split is a lawful pattern of distribution.

The *Paramount* decision is the strongest possible precedent since it considered this industry, and the very problems solved by the split. When this Court refused to compel competitive bidding, it necessarily contemplated other methods of distribution, and, indeed, explicitly mentioned their desirability. The split is the best alternative since it does not tie particular exhibitors to particular distributors. Thus, there is no taint of that vertical integration which *Paramount* found objectionable. For this Court to strike down the split would

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[7] *White Motor Co.* vs. *United States, supra* at 262.

be effectively to compel competitive bidding and thus to reverse its decision in *Paramount*.

The lawfulness of the split is also shown by the lawfulness of a parallel practice, clearance. As *Paramount* points out, clearance is a vertical restriction on an exhibitor's showing of a picture to the public. The split is a vertical restriction on an exhibitor's renting of a picture from a distributor. Since reasonable clearances are lawful, it follows that reasonable splits are lawful as well.[8] The two practices are indistinguishable in economic and legal principle, as well as in their indispensability to the motion picture industry.

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[8] We have already pointed out that both lower courts have found Petitioner's evidence of unreasonableness completely inadequate. Perhaps this essential similarity of clearances and splits motivated the Department of Justice in approving, and even urging, the use of splits in the two instances cited in the Record. The Department is thoroughly familiar with the realities of the motion picture industry and has proved alert and effective in policing the *Paramount* Decrees. Exhibitors have relied upon the Department, and continue to do so, to protect them against the discrimination prohibited by the Decrees.

CONCLUSION

It is urged that the judgment of the United States Court of Appeals for the Third Circuit be affirmed.

Respectfully submitted,

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ALLIED STATES ASSOCIATION OF MOTION PICTURE EXHIBITORS.

CERTIFICATION

I, Herman M. Levy, counsel for *amici curiae* hereinbefore named, hereby certify that a copy of the foregoing Motion for Leave to File Brief *Amici Curiae*, and Brief of *Amici Curiae*, was served on the following counsel by depositing the same in the United States Mail with postage prepaid on February 28, 1964.

Parties	*Counsel of Record*
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HERMAN M. LEVY,
A member of the Bar of this Court.